FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

---

**No. 79-5601**

---

CARLOS RIVERA GOMEZ, *Petitioner,*

v.

ASTOL CALERO TOLEDO, *Respondent.*

---

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

---

## BRIEF FOR RESPONDENT

---

FEDERICO CEDO ALZAMORA
P.O. Box 192
San Juan
Puerto Rico 00902
Phone: (809) 724-1913
*Assistant Solicitor General*
*Department of Justice*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 9 |
| I. The Plaintiff In An Action Under 42 U.S.C. § 1983 Needs To Plead Bad Faith On The Part Of The Defendant In Order To State A Claim For Relief | 9 |
| A. Petitioner did not allege any real "violation of his constitutional rights committed under color of law" and did not state a valid claim for relief under 42 U.S.C. § 1983 | 9 |
| B. The decisions of this honorable court do not in fact establish that qualified immunity is just an affirmative defense which must only be pleaded by the defendant in an action under 42 U.S.C.§ 1983 | 13 |
| C. The fact that most of the courts of appeals place on the defendant the burden of pleading qualified immunity has no hearing on the instant case, where the defendant, here respondent, took gladly upon himself that burden. | 16 |

Table of Contents Continued

PAGE

D. The court below was correct in holding that bad faith should have been an element of petitioner's pleadings in his claim for relief under 42 U.S.C. § 1983. ..... 22

E. The allegation that defendants must have the burden of pleading official immunity because the information on which the defense is based in uniquely within their control does not have any breaking of the instant case where the defendant gladly assumed the burden of pleading qualified immunity, and where the statement of his defense was obviously based on the letter of the applicable regulations or on information filed on public records easily available to the plaintiff since they even figured on his own record..... 25

II. Petitioner Has Unsuccessfully Alleged Violation Of His Constitutional Rights Under The First Amendment And Did Not Allege Any Violation Of Any Rights Under The First Amendment. ..... 29

A. The discharge of petitioner without a prior formal administrative hearing was not a deprivation of property or liberty or a violation of due process of law..... 29

B. Petitioner's complaint did not state a specific claim for relief under the first amendment since he did not allege that he was discharged in retaliation for an exercise of protected speech. .. 31



Table of Contents Continued

PAGE

CONCLUSION ..... 32

PROOF OF SERVICE ..... 34

## TABLE OF AUTHORITIES

CASES:

*Apton* v. *Wilson,* 500 F.2d 83 (D.C. Cir. 1974) .... 21

*Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339 (2d. Cir. 1972) ..... 18

*Boscarino* v. *Nelson,* 518 F.2d 879 (7th. Cir. 1975) . 20

*Brubaker* v. *King,* 505 F.2d 534 (7th. Cir. 1974) ... 20

*Bryan* v. *Jones,* 530 F.2d. 1210 (5th. Cir. in banc 1976) *cert. denied* 429 U.S. 365 (1976) ..... 19

*Butz* v. *Economou,* 98 S. Ct. 2894, 46 L.W. 4952 (June 29, 1978) 438 U.S. 478 (1978) ..... 15, 26-27

*Carey* v. *Piphus,* 435 U.S. (1978) ..... 27

*Carter* v. *Carlson,* 447 F.2d 358 (1971)..... 26

*Cobb* v. *City of Malden,* 202 F.2d 701 (l Cir. 1953) 26

*Conley* v. *Gibson,* 355 U.S. 41 (1957)..... 12

*Crabtree* v. *Brennan,* 466 F.2d 490 (6 Cir. 1972) ... 11

*Cruz* v. *Beto,* 603 F.2d 1178 (5th. cir. 1979) ..... 16

*Curtiss* v. *Everett,* 489 F.2d 516 (3 Cir. 1973) *cert. den.* 416 U.S. 985 ..... 11

*Curtiss* v. *Peerless Ins. Co.,* 299 F. Supp. 429 (D.C. Minn. 1969) ..... 9

*Dellums* v. *Powell,* 566 F.2d 167 (D.C. Cir. 1977) *cert. den.* 438 U.S. 916 (1978) *reh. den.* 439 U.S. 886 (1978) ..... 21

*District of Columbia* v. *Carlson,* 409 U.S. 418 (1973) ..... 26

Table of Authorities Continued


| CASES: | PAGE |
|---|---|
| *Donovan* v. *Reinhold,* 433 F.2d 738 (10th. Cir. 1970) | 21 |
| *Downs* v. *Department of Public Welfare,* 368 F. Supp.454 (E.D. Pa. 1973) | 11 |
| *Gaffney* v. *Silk,* 488 F.2d 1248 (1 Cir. 1973) | 27 |
| *Giver* v. *Baker,* 576 F.2d 245 (9th. Cir., 1978) | 20 |
| *Glasson* v. *City of Louisville,* 518 F.2d 899, 907-910 (6th. Cir. 1975) *cert. den.* 423 U.S. 930 (1975) | 20 |
| *Guedry* v. *Ford,* 431 F.2d 660 (5 Cir. 1970) | 12 |
| *Harrison* v. *Brooks,* 446 F.2d 404 (1 Cir. 1971) | 26, 27 |
| *Hellem* v. *Roberts,* 386 F.2d 382 (CA 2, 1967) | 9 |
| *Hoffman* v. *Holden,* 268 F.2d 280 (9 Cir. 59) | 12 |
| *Hopkins* v. *Wasson,* 227 F. Supp. 278 (DCED Tenn. 1964) *affd.* 329 F.2d 67, (CA 6, 1964) *cert. denied* 379 U.S. 854 (1964) | 9 |
| *Javits* v. *Stevens,* 382 F. Supp. 135 (DCSDNY 1974) | 9 |
| *Jones* v. *Penegan,* 459 F.2d 81 (6th. Cir. 1972) | 20 |
| *Ka-Harr, Inc.* v. *Huck,* 345 F. Supp. 54 (E.D. Wis. 1972) | 27 |
| *Kostka* v. *Hogg,* 560 F.2d 37 (1 Cir. 1977) | 26 |
| *Krum* v. *Sheppard,* 255 F. Supp. 944 (W.C. Mich. 1966) | 9 |
| *Landrum* v. *Moats,* 576 F.2d 1320 (8th. Cir. 1978), *cert. den.* 439 U.S. 912 | 20 |
| *Laverne* v. *Corning,* 522 F.2d. 1144 (2d. Cir. 1915) | 19 |
| *Maiorana* v. *MacDonald,* Slip Opinion 78-1424 decided on April 18, 1979 (1 Cir.) | 26 |
| *Martin* v. *Duffe,* 463 F.2d 464 (10th. Cir. 1972) | 21 |




Table of Authorities Continued


| CASES: | PAGE |
|---|---|
| *Joaquin Mendoza Aldarondo* v. *Puerto Rico Government Employees Assistant,* 94 PRR 538 (1967) | 23 |
| *Metcalf* v. *Ogilvie,* 436 F.2d 361 (7 Cir. 1970) | 12 |
| *Monaco* v. *Carbon Black Inc.,* 359 U.S. 180 | 22 |
| *Monroe* v. *Pape,* 365 U.S. 167 (1961) | 13 |
| *McCray* v. *Burrell,* 516 F.2d 357 (4th. Cir., in banc) 1975 | 19 |
| *Parish* v. *National Collegiate Assoc.,* F.2d. 1028 (5 Cir., 1975) | 11 |
| *Pierson* v. *Ray,* 388 U.S. 547 (1967) | 13, 14, 27 |
| *Procunier* v. *Navarette,* 434 U.S. 555 (1973) | 15 |
| *Rainer* v. *Short,* 578 F.2d 621 (5th. Cir. 1978) 99 S. C. 1425 (1979) | 19 |
| *Robert* v. *Williams,* 456 F.2d 819 (5 Cir. 1973) | 26 |
| *Judith Rodríguez de Quiñones, et al* v. *Honorable Julio César Pérez, et al,* decided by the United States Court of Appeals for the First Circuit on March 30, 1979 | 10 |
| *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F.2d 732 (3rd. Cir. 1973) | 18 |
| *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) | 13, 14, 15, 26 |
| *Serzypho* v. *Chase Manhattan Bank,* 461 F.2d 14 (3 Cir. 1971) | 11-12 |
| *Skenan* v. *Board of Trustees of Bloomsburg State College,* 558 F.2d 53 (3rd. Cir. in banc, 1976) *cert. den.* 429 U.S. 979 (1976) | 17 |
| *Thompson* v. *Burke,* 556 F.2d 231, 3rd. Cir. 1977 | 18 |
| *Tritsis* v. *Backer,* 501 F.2d 1021 (7th. Cir. 1974) | 20 |

Table of Authorities Continued


CASES: PAGE

*United States* v. *Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963) *affd.* 326 F.2d 237 (CA 5, 1964) *cert. denied* 397 U.S. 929 (1964) ..... 9

*Wood* v. *Strickland,* 420 U.S. 308 (1975) ... 13, 15, 27

*Zweibon* v. *Mitchell,* 516 F.2d 594 (1975), *cert. den.* 425 U.S. 944 (1976) ..... 21

**STATUTORY PROVISIONS**

42 U.S.C. § 1983 ..... *passim*

28 U.S.C. § 1343, § 1 of the Fourteenth Amendment to the Constitution of the United States of America ..... 2, 9

Law 77 of June 22, 1956 as amended (25 LPRA, §§ 221-221t) ..... 4

Section 14(E) of Act 26 of August 22, 1974 (25 L.P.R.A., § 1014(e) Cumulative Pocket Supplement of 1978) ..... 4

33 LPRA 4190 (1978 Cumulative Pocket Supplement) effective since January 22, 1975 (Article 149 Of the Puerto Rico Penal Code ..... 4

Rules 3 and 26, Chapter 7, § 1, Regulations of the Police of Puerto Rico ..... 4, 31

Act No. 26 of August 22, 1974 ..... *passim*

Puerto Rico Police Regulations of 1968 ..... 23, 28

Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976 ..... 30


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-5601

---

CARLOS RIVERA GOMEZ, *Petitioner,*

v.

ASTOL CALERO TOLEDO, *Respondent.*

---

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

---

## BRIEF FOR RESPONDENT

TO THE HONORABLE COURT:

Now comes Respondent through its undersigned attorneys and respectfully prays that the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on August 7, 1979, be affirmed.

## OPINION BELOW

The references made to the opinion and judgement of the United States Court of Appeals for the First Circuit rendered on August 7, 1979 and to the unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated on October 23, 1978, as stated by the Petitioner in his Brief, are correct, and in order to avoid unnecessary repetitions we adopt them herein.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Petitioner.

## STATUTES INVOLVED

The Federal Statutes involved are: 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343 and sec. 1 of the Fourteenth Amendment to the Constitution of the United States of America. The pertinent provisions of those and other related statutes are included in the Brief For Petitioner.

## QUESTION PRESENTED

Whether the plaintiff in a civil rights action filed under 42 U.S.C. § 1983 must allege bad faith on the part of the defendant in order to state a claim for relief.

## STATEMENT OF THE CASE

This civil rights action for damages was filed at the United States District Court for the District of Puerto Rico by Carlos Rivera Gomez, formerly and still currently an agent with the Police Department of the Commonwealth of Puerto Rico, against Astol Calero Toledo, Superintendent of the same, seeking monetary compen-



sation for supposed damages and injuries said to be caused by an alleged deprivation of some of his constitutional rights when he was temporarily discharged from the police force on July 14,1976.

In April 1975, the petitioner, not acting within his official duties, and on account of knowledge admittedly obtained by unauthorizedly tapping private telephone conversations with other police agents, made serious imputations regarding two other agents of the Bureau of Criminal Investigations of the Police Department, concerning what he considered as false evidence supposedly obtained and offered as evidence admissible in Law by those two fellow agents in a criminal case under *their* investigation.

An official inquiry was conducted as a result of the petitioner's imputations, but since it failed to substantiate them, it was recommended that petitioner not be returned to his former duties in the city of Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself, on his own whim, in investigations officially assigned to other agents. Accordingly, the petitioner was transferred to the Police Headquarters in San Juan and later, as an instructor, to the Police Academy.

During the term of petitioner's duties as an instructor in the Police Academy, he testified on behalf of the defendant in a criminal case against one of the most sought after criminals in the island, declaring there that the case had been "fabricated" by two investigative agents; but, notwithstanding petitioner's testimony as to the alleged "fabrication", on March 27, 1976 the jury found the defendant, nevertheless, guilty of first degree murder.

Then, as a result of plaintiff's having admitted in court that he had, on his own, tapped private telephone conversations of the agents allegedly involved in the above mentioned "fabrication", the judge presiding the criminal case ordered that the tapes be produced, and subsequently, criminal charges were brought against petitioner for violation of article 149 of the Puerto Rico Penal Code,[1] pursuant to a report and recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano, on May 20, 1976.

By letter of May 26, 1976, respondent Astol Calero Toledo, then Superintendent of the Police of the Commonwealth of Puerto Rico, acting in his official capacity, by virtue of authority vested on him under Law No. 77 of June 22, 1956, as amended, (25 L.P.R.A., secs. 221-221t), and regulations issued thereunder, and in due compliance with Sec. 14(E) of Act 26 of August 22, 1974 (25 L.P.R.A., sec. 1014(e), Cumulative Pocket Supplement of 1978), suspended petitioner temporarily from employment with the Police Department while he was being investigated on account of the aforementioned criminal charges.

On July 14, 1976, petitioner was duly discharged from employment for violating Rules 3 and 26, Chapter 7, Sec. 1, Regulations of the Police of Puerto Rico by

[1] 33LPRA 4190 (1978 Cumulative Pocket Supplement) effective since January 22, 1975, which reads:

> "Every person who for his own or another's benefit, or to injure another, utilizes, negotiates, speculates, employs or otherwise makes use of a personal private message which has been unlawfully intercepted, violated, or recorded or who in any way induces or attempts to induce any agent, officer or employee of a telephone or telegraph company to disclose the contents of any private communication shall be punishable by imprisonment not exceeding three years or a fine not exceeding five thousand dollars or both in the discretion of the Court."



contesting unwarrantedly the honesty, integrity and competence of two fellow member of the corps, making improper manifestations denigrating their dignity, and observing an injurious or disorderly conduct, thus harming the Police Department. Said discharge was in accordance with the applicable provisions of Commonwealth Law, which provides for appeal before the Investigation, Prosecution and Appeals Commission (CIPA), and petitioner was duly informed of his right to appeal from that order.

Petitioner appealed from his discharge by respondent Astol Calero Toledo's letter of July 14, 1976, before the Investigation, Prosecution and Appeals Commission, (CIPA), which after a hearing, and by ruling of December 1, 1976, revoked Astol Calero Toledo's administrative order discharging petitioner from employment and ordering his reinstatement to his former position, *with salaries accrued,* all of which was complied with as it was due.

Claiming that, as result of the shortlived[2] discharge from his former employment, he had suffered stress, anxiety, embarassment and impairment to his reputation, the petitioner, on July 14, 1977 sued the respondent for compensatory, punitive and exemplary damages before the United States District Court for the District of Puerto Rico.

The District Court dismissed the case on October 23, 1978, since from the complaint's deficient allegations, no set of probable facts were apparent which would entitle the plaintiff, here petitioner, to the relief claimed, because it had not even been alleged that the Superintendent of Police had acted in bad faith or that

[2] Three and a half months.

his conduct in suspending and discharging him had been purposefully discriminatory or reckless.

Petitioner appealed before the United States Court of Appeals for the First Circuit, which on August 7, 1979 affirmed that decision, considering that, since public officials acting in their official capacity enjoy qualified immunity from liability for damages if they have acted in good faith, the failure of plaintiff (here the petitioner) to allege bad faith, malice or even recklessness, plus the lack of any facts on which to make such an inference, did not allow for the Superintendent (here the respondent) to be held lialable for damages, noting also as significant, the fact that plaintiff (here the petitioner) did not move to amend the complaint in the light of the applicable law after it was dismissed by the District Court.

## SUMMARY OF ARGUMENT

Petitioner holds simply that in order for him to state a claim for relief in a civil rights case against a public official filed under 42 U.S.C. sec. 1983, he did not even need to allege bad faith on the part of the Respondent, just because in many other circuits cases such pleading had not been required and because this Honorable Court has suppossedly held the opposite.

Respondent holds that such contentions are not true, that no constitutional right of the petitioner was ever violated by him, and that in order to state a valid claim for relief, petitioner's complaint should have at least included allegations of facts which, if proven, would have entitled him to the relief claimed, and also, that, since respondent pleaded that he had acted in good faith and in his official capacity while discharging petitioner from his job, he actually enjoyed qualified im-



munity from liability for damages, concerning which, petitioner failed even to allege bad faith, malice or recklessness in the discharge of his official duties, or to evoke any facts from which such a tendencious inference could be made.

Only temerity, or a less than diligent pursuit of petitioner's own interests left the granting of a writ of certiorari, available as a last recourse, which otherwise would have been unnecessary if the petitioner, in the light of the applicable law, had just moved to amend his complaint (dismissed for failure to allege enough) when faced merely with the need to comply with a basic pleading requirement. The decision of the Court of Appeals is not in conflict with any of the applicable decisions of this Honorable Court, is not in direct conflict, since it can be distinguished, due to differences in the concurring facts, with decisions of other courts of appeals on matters of federal law, it does not pose an irreconcilable conflict in the application of rules of law and only represents a correct exercise of independent judgment by the First Circuit.

The decision of the court below might also have been issued as well in view of self evident assertions such as that respondent's decision was made as Superintendent of Police, consonant with what was provided in all applicable laws, rules and regulations, considering what he, acting only upon recommendation arising from an official inquiry, had perceived then to be more convenient to the spirit and reputation of the Police Department, which had been harmed by the irregular and unorthodox activities of petitioner who (after tapping private telephone conversations) had made, in an improper way manifestations denigrating the dignity, honesty, integrity and competence of two

fellow officers, "observing an injurious or disorderly conduct".

In the absence of any clear violation of statutory due process and lacking the necessary allegations of factual circumstances to support the equally absent imputations of bad faith, the allegations of the complaint could only be deemed as insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof, through a complaint that chose fatally to ignore a basic pleading requirement, is that the Superintendent had incurred in an administrative error while discharging the plaintiff, a situation to which, shortly after, adequate remedy was granted when petitioner was reinstated to his former position, with salaries accrued, upon an order issued by the Investigation, Prosecution and Appeals Commission of the Police Department.

The decision of the Court of Appeals did not affirm a decision where an assumption of qualified immunity had been automatically applied, though it might have seemed so, since, though it went unsaid, the concurrence of such a sine qua non factor as good faith was given its due credit only after the District Court could ponder on the validity of the affirmative defenses put forward by the respondent, which rested simply on his full compliance with the applicable dispositions of law.[3]

Thus, The Court of Appeals did not err, when it concluded that the failure of plaintiff to allege bad faith plus the lack of any facts on which to make such an inference, was fatal, mainly in view of the fact that respondent had raised effectively the issue of qualified immunity.

---

[3] Please refer to Memorandum of Law in Support of Motion to Dismiss filed by defendant, (here respondent), on July 3, 1977 Docket Entry #12.



## ARGUMENT

### I. The Plaintiff In An Action Under 42 U.S.C. § 1983 Needs To Plead Bad Faith On The Part Of The Defendant In Order To State A Claim For Relief.

#### A. Petitioner did not allege any real "violation of his constitutional rights committed under color of Law" and did not state a valid claim for relief under 42 U.S.C. § 1983.

A plaintiff may have a cause of action under 42 U.S.C. Sec. 1983 and 28 U.S.C. 1343 *only* if he can sustain that his rights under the laws of Constitution of the United States have been violated by a person acting under color of law. In the present case, the only Constitutional right that plaintiff alleged was violated,[4] was his statutory due process, which he alleged is granted to him under Act 26 of August 22, 1974 (25 LPRA, Sec. 1014-b), but we respectfully believe that petitioner was dealt with, administratively, in accordance to the method the said *state* law provides for the imposition of disciplinary measures. (Please see: *Curtiss* v. *Peerless Ins. Co.*, 299 F. Supp. 429 (D.C. Minn. 1969); *Krum* v. *Sheppard,* 255 F. Supp. 944 (W.C. Mich. 1966); *United States* v. *Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963); affd. 326 F.2d 237 (CA 5, 1964), cert. denied 397 U.S. 929 (1964); *Javits* v. *Stevens,* 382 F. Supp. 135 (DCSDNY 1974). Also see; *Heller* v. *Roberts,* 386 F.2d 382 (CA 2, 1967); *Hopkins* v. *Wasson,* 227 F. Supp. 278 (DCED Tenn. 1964) affd. 329 F.2d 67, (CA 6, 1964) cert. denied 379 U.S. 854 (1964).

---

[4] Please refer to paragraph 17 of the Complaint.

Act No. 26 of August 22, 1974 (supra) did not require the celebration of a formal administrative hearing prior to the imposition of disciplinary measures upon members of the police force, but only and simply, the "opportunity to be heard" (which petitioner has not even alleged that it was denied). Anyhow, in *Judith Rodríguez de Quiñones, et al.,* v. *Honorable Julio César Pérez, etc., et al.,* decided by the United States Court of Appeals for the First Circuit on March 30, 1979 the Court held that a pre-termination hearing was not required if opportunity for a post-termination hearing was offered. This point became moot for petitioner once he was reinstated by Respondent, thus the dismissal of petitioner without a pre-termination hearing (even if it had been actually required by law, which it was not) could never be construed as violative of his rights to due process, and much less could it be implied that respondent Calero's participation in that decision amounted, even by a long stretch of imagination, to a demonstration of bad faith, reckless or even purposefully discriminatory conduct.

We respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, reversing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former position with salaries accrued." (Please Refer To: Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation), thus his allegations in this respect were moot, irrelevant, unnecessary and in any case insufficient.

It is well settled that in order to state a claim upon which relief may be granted pursuant to 42 USC Sec.



1983, a plaintiff must at least allege facts which, if proven, will suffice to establish he was deprived of a federally protected right as a result of the breach, by defendant, of his legal duty. In order to prevail, a plaintiff must establish that he has been deprived of a right guaranteed by the Federal Constitution. (Please see: *Crabtree* v. *Brennan,* 466 F. 2d 490 (6th Cir. 1972). He must further establish that defendant caused the alleged constitutional deprivations while acting under color of state law. (Please see: *Downs* v. *Dept. of Public Welfare,* 368 F. Supp. 454 (E.D. Pa. 1973). Ultimately, he must *show* that a duty existed, imposed upon the defendant by law, and that he breached it.

In the present case, the caption of the Complaint included as defendants: The Commonwealth of Puerto Rico and The Police of the Commonwealth of Puerto Rico. Besides there being the Eleventh Amendment bar, as to these defendants, as we have previously analyzed in other writing on record, there was also a total absence of factual allegations or specific acts of these defendants which might merit a remedy from the District Court. Nowhere in the instant Complaint could there be found an allegation, as to these defendants specifically, and, except for the caption of the case, these defendants were not named or alleged against by plaintiff in the entire Complaint. It was respectfuly submitted that plaintiff, having failed to make factual allegations as to the involvement of these defendants in the alleged damages for which he asked indemnity, had failed to properly assert a cause of action against them under the Civil Rights statutes, since in a Civil Rights Complaint, the allegations made must state the specific facts upon which relief may be granted against these defendants. (Please see: *Parish* v. *National Collegiate Assoc.,* F. 2d 1028 (5 Cir., 1975); *Curtiss* v. *Everett,* 489 F. 2d 516 (3 Cir. 1973), cert. den. 416 U.S. 985; *Ser-*

*zypho* v. *Chase Manhattan Bank,* 46l F. 2d 14 (3 Cir. 1971); *Metcalf* v. *Ogilvie,* 436 F. 2d 361 (7 Cir. 1970); *Guedry* v. *Ford,* 43l F. 2d 660 (5 Cir. 1970); *Hoffman* v. *Holden,* 268 F. 2d 280 (9 Cir. 1959).

It was submitted, in accordance with all the above mentioned contentions, that the instant complaint failed to state specific acts of the Superintendent of Police which would amount to deprivation of any of plaintiff's federally protected rights, and as such should also be dismissed, since he was merely an alter ego of the Commonwealth of Puerto Rico and thus not a "person" amenable to suit under 42 U.S.C. § 1983.

In *Conley* v. *Gibson,*355 U.S. 41 (1957) this Honorable Court stated that a complaint should not be dismissed for failure to state a clain unless it appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, but it must be conceded that in its Decision and Order dismissing the instant case, the District Court specified precisely that "no set of probable fact are apparent which would entitle Plaintiff to the relief claimed."

May we respectfully ask: How can any plaintiff be expected to set himself to prove something which has not even entered his mind? How can it be inferred that somehow he would ever venture to prove something that he has not even claimed to have happened?

The purpose of pleading may ultimately be to facilitate a proper decision on the merits, but what if, as in the instant case, the very insufficiency of the pleading precluded the District Court from seeing any merit at all in the complaint? How could the Court be blamed?



**B. The decisions of this honorable court do not in fact establish that qualified immunity is just an affirmative defense which must only be pleaded by the defendant in an action under 42 U.S.C. § 1983.**

The instant case does not happen to be one where a decision of a Court of Appeals clearly fails to apply Supreme Court decisions, neither deliberately or because of error or oversight.

There is not any direct conflict between the decision of which review is being sought by petitioner and any decision of this Honorable Court (who as a matter of fact, has not yet squarely declared how the burden of proof falls when the immunity issue is raised), since it was precisely based on decisions of its own, such as those in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), *Pierson* v. *Ray* 388 US 547 (1967) and *Wood* v. *Strickland,* 420 US 308 (1975).

In *Monroe* v. *Pape,* 365 U.S. 167 (1961), cited by petitioner, it was held only that a civil right plaintiff did not have to allege a willfull violation of constitutional rights or a specific intent to violate constitutional rights.

The instant case was dismissed mainly because from the complaint's deficient allegations, no set of probable facts were apparent which would entitled plaintiff, here petitioner, to the relief claimed, and not because he might have merely failed to allege a specific intent to violate or a willfull violation of his rights. Petitioner not only failed to allege bad faith then, and to prove with particularity any willfull violation of his rights, but, more significantly, he failed even to state with particularlity any prima facie violation at all to his constitutional rights, be it willfull or not, while at the same

time, respondent, spontaneously raised the issue of immunity putting it forward as a defense.

The dismissal of plaintiff, here petitioner, was not *willfully* effected. It took place only upon completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

In *Pierson* v. *Ray,* 386 U.S. 547 (1967), this Honorable Court held that defendants *would have available* to them the defense of good faith, which was put forward by respondent in the instant case, and while it noted that a complaint should not be dismissed for failure to state that the officers had a specific intent to deprive a person of a federal right, it can not be presumed either that the instant case, was dismissed *only* on those grounds, since here, the court also had the benefit of considering the reasonableness and validity of the affirmative defenses put forward by the respondent.

Respectfully we deem that it can not be said justly that the court below held that the plaintiff must *negate* in his complaint the existence of the defendants' qualified immunity, when what was actually held there, is that he had only to allege that the defendant had acted in bad faith, leaving upon the defendant the initiative of stating that he had access to a qualified immunity since he had acted only in good faith within the scope of his official duties.

In *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) this Honorable Court held that there is no "*automatic* assumption" that defendant public official have acted in good faith, and that such good faith can not be taken for granted.



The decision of the Court of Appeals below does not contradict at all this language of *Scheuer* v. *Rhodes,* since at the District Court, whose decision was affirmed by it, such "assumption", far from being automatically applied, and since such good faith, far from being taken for granted, were given both their due credit only after the court could ponder on the validity of the affirmative defenses put forward by the respondent.

In *Wood* v. *Strickland,* 420 U.S. 308 (1975), this Honorable Court held that *where the applicable constitutional principles were settled,* a plaintiff need not show *malice* on the part of a defendant, in order to prove a claim. This poses no conflict with the decision in the instant case, (where the applicable constitutional principles were not settled at all), and which obviously deemed that the complaint had not been specific and factual as to the claims made failing to comply with a basic pleading requirement. It was underscored that the pleader would have been entitled to relief not by actually showing malice but merely alleging that the respondent had acted in bad faith.

Petitioner cites *Butz* v. *Economou,* 438 US 478 (1978), but that case, besides contributing a deep historical analysis of the immunity defense, does little if anything at all to bolster his contentions, while on the contrary, as we see in *Procunier* v. *Navarette,* 434 US 555 (1973), this Honorable Court conclusively affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported by affidavits. This had a direct bearing on the instant case, where the defendant raised the same defense in his answer to the complaint (Nov. 10, 1967) and on his Motion to Dismiss filed on July 3, 1978, supported nonetheless by direct citations of the laws, rules and regulations applicable which stood by themselves.

**C- The fact that most of the courts of appeals place on the defendant the burden of pleading qualified immunity has no bearing on the instant case, where the defendant, here respondent, took gladly upon himself that burden.**

There is not any vital conflict between the decision as to which review is sought, and that rendered by other courts of equal rank. In the instant case we shall see that the alleged conflict supposedly giving rise to the petition is not a true one, and that it does not, in fact, even exist as such.

There might be some differences in principle, but not a real conflict in the actual application of rules of law.

There is also support, in the Fifth Circuit, for the position that plaintiffs have the burden of negating qualified immunity, but we respectfully venture, that in all circuits, plaintiffs would gladly forward their cause by assuming the burden of contradicting or negating any claim of qualified immunity once it has been put forward and fundamented by a defendant, as it was in the instant case.

In *Cruz* v. *Beto,* 603 F.2d 1173 (5th Cir. 1979), quoted by the Petitioner, the court went as far as to state that under some circumstances, the plaintiff had the burden of *piercing* qualified immunity by pleading and proving an abuse of authority or bad faith, once such immunity had been established by the defendant *by virtue of asserting* that his questioned decisions were made in his official capacity, based on what he perceived to be a security need of the institution of which he was Director. (In the instant case, the Superintendent of



Police did exactly the same, asserting that he had acted in his official capacity based on all laws, Rules and Regulations applicable, which he proceeded then to cite and explain). The court agreed that the plaintiffs had to carry that burden, since to deny the defendant qualified immunity protection unless he demonstrated that his actions were above the bench work of legal good faith, would make the concept of qualified immunity "a meningles embellishment."

It must be born in mind that in the instant case, the respondent gladly took upon himself the burden of stating and explaining his good faith, even when the plaintiff had failed not only to mention "it with that many words," but even to imply any bad faith on his part, concerning respondent's official participation in his discharge.

None of the cases cited by petitioner pose an unsolvable conflict with the instant decision below, due to the particular factors concurring here, where not only the petitioner failed to allege anything which would entitle him to the relief claimed, but also, more significantly, where the respondent successfully put forward an affirmative defense of good faith based on strict complaince with all applicable laws, rules and regulations which explained and justified his behavior all by themselves.

The applicability of decisions in other cases invoked by petitioner does not bear closer scrutiny when it is considered that most of them did not deal with how the burden of proof falls *when* the immunity issue is raised, but rather delve on who should actually raise it.

In *Skenan* v. *Board of Trustees of Bloomsburg State College,* 558 F2d. 53 (3rd Cir. in banc, 1976).

Cert. den., 429 US 979 (1976), originally cited by Petitioner as "the most directly in conflict with the decision below", the court, considering questions of burden of proof, held that the burden is on the defendant official claiming official immunity, to come forward and to convince the trier of fact, that official immunity should attach.

Is it not just that what respondent did in the instant case when he came forward in his Answer to the Complaint, stating as an affirmative defense and explaining how at all times he had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties?

Is there any real conflict between the aforementioned case and the decision below, just because here, the trier of facts, after considering the pertinent dispositions of all laws and regulations invoked, was convinced that official immunity should attach? Of course not, and the same applies to two of the other cases cited by petitioner, like *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F 2d 732 (3rd Cir. 1973), and *Thompson* v. *Burke,* 556 F2d 231, 3rd Cir. 1977).

In *Bivens* v. *Six Unknown Named Agents,* 456 F2d 1339 (2d. Cir. 1972), also cited by petitioner as "probably the leading case on the good faith defense in § 1983 actions among lower federal court decisions", the Court merely held that public officials have no *absolute* immunity from suits for constitutional deprivations (something that no one ever claimed in the instant case) and that it is a defense to allege and prove good faith (an affirmative defense which was brought before the court by respondent in the instant case).

May we respectfully ask: Where is the real conflict?



There is none, and of course if there were any, it would not be irreconcilable at all. The same applies to *Laverne* v. *Corning,* 522 F2d 1144 (2d Cir. 1915), also cited by the petitioner.

In *McCray* v. *Burrell,* 516 F2d 357 (4th Cir., in banc), (1975), cited by the petitioner, it was held that qualified immunity was a matter of defense. In the instant case, it was in effect brought up by the defendant, here respondent, as an affirmative defense.

In *Bryan* v. *Jones,* 530 F2d 1210 (5th Cir., in banc 1976), Cert. denied 429 U.S. 865 (1976), it was held that good faith is a defense (one that was alleged by Respondent in the instant case) and that a plaintiff need not *prove* its absence to make out a prima facie case. In the instant case the petitioner failed first not only to prove but even to allege such absence and later to contradict the presence of good faith once it had been invoked, claimed and explained by respondent.

Is there any similarity at all? Certainly petitioner must concede that there is a difference between not needing to prove anything beforehand, and failing later to contradict something that has been already claimed and explained to the subsequently evident satisfaction of a court.

In *Rainer* v. *Short,* 578 F2d 621 (5th Cir. 1978) 99 S.C. 1425 (1979), the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense on the defendants.

Respectfully we deem that there is no real conflict between a decision that merely requires plaintiffs to allege something, and another one that places on defendants the burden of contradicting later such allegation by proving that the contrary was true. In fact it could be said that both complement each other.

In *Glasson* v. *City of Louisville,* 518 F2d 899, 907-910 (6th Cir. 1975) *Cert. den.* 423 U.S. 930 (1975) and in *Jones* v. *Penegan,* 459 F.2d 81 (6th Cir. 1972), cited by the petitioner, the courts characterized qualified immunity as an affirmative defense, which was just and exactly the way respondent qualified it in his answer to the complaint.

In *Tritsis* v. *Backer,* 501 F2d 1021 (7th Cir. 1974), *Brubaker* v. *King,* 505 F. 2d 534 (7th Cir. 1974). *Boscarino* v. *Nelson,* 518 F2d 879 (7th Cir. 1975), also cited by the petitioner, qualified immunity is treated as a defense, something that poses no real conflict with the decision below in the instant case, which besides treating the aforementioned immunity likewise, merely sets the allegation of absence of an element to which it is conditioned, (good faith), as a pleading requirement.

In *Landrum* v. *Moats,* 576 F2d 1320 (8th Cir. 1978), Cert. den. 439 US 912, cited by the petitioner, it was held that, as in the case of any other affirmative defense, the burden of proving good faith (as an element of the defense, to the jury's satisfaction) was on the defendant. In the instant case, such burden was spontaneously borne also by the defendant and if, as stated there, the validity of the defense is "orinarily" a question for the jury, in the instant case, since the affirmative defense rested on the strict compliance with all applicable rules and regulations, we respectfully deem that such question was really for the judge.

In *Given* v. *Baker,* 576 F2d 245 (9th Cir. 1978), it was held that the plaintiff needs only to make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant. In the instant case, good faith was brought forward by respondent as an affirmative defense, even when petitioner had not really made out a prima facie case of a constitutional violation.



The actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and far from being a "blatant disregard of his agency's procedural requirements," they constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, could not and should not be utilized as the basis for a civil rights claim.

In *Donovan* v. *Reinhold,* 433 F2d 738 (10th Cir. 1970), it was held only that good faith *would* be a defense, something that we do not dispute, since that does not preclude the fact that it *could* also be a pleading requirement.

In *Martin* v. *Duffe,* 463 F2d 464 (10th Cir. 1972), it was held that good faith most be put forward as a defense, something that was done in the instant case.

In *Dellums* v. *Powell,* 566 F2d 167 (D.C. Cir. 1977), Cert. den. 438 U.S. 916 (1978) reh, den. 439 U.S. 886 (1978); *Apton* v. *Wilson,* 500 F. 2d 83 (D.C. Cir. 1974) and *Zweibon* v. *Mitchell* 516 F.2d 594 (1975), Cert. den. 425 U.S. 944 (1976), it was also held that the burden of proving qualified immunity is on the defendants. This does not preclude the fact that an imputation on the contrary should precede such protestations of immunity.

There is no unresolvable conflict between the above decision cited and the instant decision below, nevertheless, the fact that such decision might somehow conflict with that of other appellate courts on any issue did not constitute an adequate reason for arousing the attention of this Honorable Court.

As it was stated in The *Monaco* v. *Carbon Black Inc.*, 359 U.S. 180 (at 184): "While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial, Resolution here of the . . . [Issue in conflict among the circuits] can await a day when the issue is posed less abstractly." So, the fact that some circuits may have established different pleading requirements can be more properly considered as a correct exercise of independent judgment concerning only allegations that can not be construed as placing the burden of proving anything on anyone but the most concerned part.

**D. The court below was correct in holding that bad faith should have been an element of petitioner's pleasings in his claim for relief under 42 U.S.C. § 1983.**

Dismissal of plaintiff was effected only upon completion of an administrative investigation, in which he had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation. How could it have been so lightly deemed as willfull on his part, when respondent acted only upon valid counsel properly issued by the pertinent official board.

It should be noted here that the persons who actually conducted the aforementioned administrative investigation and those who formulated the pertinent recommendations thereof, are not parties to the present action although they should be, and are indispensable pursuant to the Federal Rules of Civil Procedure, but nevertheless, the reinstatement of plaintiff to his former



position with back pay accrued effected by the Investigation Prosecution and Appeals Commission (C.I.P.A.) in accordance with the applicable provisions of law, far from constituting evidence of bad faith or purposeful discrimination on the part of the Superintendent, established beyond doubt that he was willing and able to face the facts, concede that he had incurred in an administrative error and set himself immediately to the task of setting it straight.

All the actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and constituted a valid and lawful discharge of his official duties.

Absent any claim or proof on the contrary, we are bound to presume that any government official is acting, as expected, within the scope and limitations of his authority, according to all applicable Laws, Rules and Regulations or at least, when facing a mistake, we should presume first that it may have been motivated by error rather than by bad faith. (See *Joaquin Mendoza Aldarondo* v. *Puerto Rico Government Employees Assistant,* 94 P.R.R. 538 (1967).

In the instant case we understand that some of the allegations in the Complaint as to Superintendent Calero were highly conclusory and, as such, not sustained at all by law. (Please Refer to Paragraphs 10, 11, 12, 14 of the instant complaint.) That other allegations in the Complaint as to the Superintendent, were only stating that the Superintendent acted in accordance with Act 26, 1974 which created the Law of the Police, and the Puerto Rico Police Regulations of 1968, which were the two statutes and Rules then in force which provided for the Police and the Superintendent to act as aabide

themselves by. (Please refer to paragraphs 1, 6, 12, 13 of the Complaint.)

Nowhere in the complaint was Respondent Calero charge specifically with having acted in bad faith. It was never said that his conduct was reckless or purposefully discriminatory, while on the contrary, he asserted, not only that he had acted in good faith in the performance of his official duties, but also explained positively how the applicable provisions of law had been dutifully complied with.

As we can see, his good faith, far from being automatically acknowledged in the eloquent absence of any imputation of bad faith, was conceded in full sight of the scope of his official duties as stated in the above cited Laws and Regulations and the alleged correctness of their discharge. Plaintiff then failed totally in fulfilling his affirmative obligation to allege and prove that the Superintendent of Police had acted otherwise.

It is therefore plainly evident that the District Court did not lightly presume, neither simply took for granted, the fact that respondent had acted in good faith. His qualified immunity, based mainly on it, was not born from an "automatic assumption" supposedly applied to a certain type of situacion, but from the affirmed and *uncontested* essential fairness, and correctness of his performance while discharging his official duties.

As stated in the Decision of the Court of Appeals:

> "Nowhere in the lengthy recitation of facts is there any reference to bad faith, malice or recklessness or facts on which such an inference could reasonable be based." . . . "the complaint does not set forth facts alleging such wrongdoing by defendant as to raise an inference of bad faith. *Diaz González* v. *Colón Gonzáles,* 536 F.2d 453, 450, (lst Cir. 1976)."



It was only after deeming that it must be assumed that when a plaintiff is represented by counsel, the complaint is drown in the light of the applicable law and contains the pertinent fact, that the Court of Appeals stated that:

> "The failure of plaintiff to allege bad faith, malice or recklessness in so many words, plus *the lack of any facts* on which to make such an inference is fatal." (Emphasis supplied)

Act No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force, and thus, the dismissal of petitioner without a formal pre-termination administrative hearing cannot be construed as violative of any of his rights and much less could it be said that Respondent Calero's participation in adopting a decision that was recommended to him by others in charge of the official inquiry, could amount, even by a long strecht of imagination, to a demonstration of bad faith, reckless or even purposefully discriminatory conduct.

**E. The allegation that defendants must have the burden of pleading official immunity because the information on which the defense is based is uniquely within their control does not have any bearing on the instant case where the defendant gladly assumed the burden of pleading qualified immunity, and where the statement of his defense was obviously based on the letter of the applicable regulations or on information filed on public records easily available to the plaintiff since they even figured on his own.**

The petitioner has stated that the mere fact that defendant Calero occupied an executive position within the Commonwealth government does not automatically accord him a qualified immunity, but the fact is that in the instant complaint Astol Calero was mentioned only in his official capacity as Superintendent of Police, acting in discharge of his official duties, which as such, sufficed in our judgment for the District Court to dismiss, as to defendant Calero, the present action, *since* it was not even hinted that he had breached in any way his official duties as such.

While absolute immunity has been provided to judicial and certain cuasijudicial officers as well as state legislators, the courts have been noticeably reticent about extending such broad protection to officials of the executive branch such as defendant in the case at bar. See *Scheur* v. *Rhodes,* 416 U.S. 232 (1974); *Harrison* v. *Brooks,* 446 F.2d 404 (1 Cir. 1971); *Cobb* v. *City of Malden,* 202 F.2d 701 (1 Cir. 1953). As to these officials, where independent judgment and discretion are involved, the courts have permitted only a qualified immunity based upon good faith performance of their duties as they saw them. *Robert* v. *Williams,* 456 F.2d 819 (5 Cir. 1973); *Carter* v. *Carlson,* 447 F.2d 358 (1971), rev'd on other grounds sub nom. *District of Columbia* v. *Carlson,* 409 U.S. 418 (1973).

The defense of qualified immunity, which is available to local, state and federal law inforcement officers, protects the respondent from liability for damages if he acted with a good faith belief, based upon reasonable grounds, that the measures he took were correct or necessary, *Maiorana* v. *MacDonald,* Slip Opinion 78-1424 decided on April 18, 1979, (1 Cir); *Kostka* v. *Hogg,* 560 F.2d 37, (1 Cir. 1977); *Butz* v. *Economou,* 98



S. Ct. 2894, 46 L.W. 4952 (June 29, 1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

Thus, while money damages may be maintained against such officials, petitioners have the obligation to sufficiently allege and prove that defendants' conduct was either "purposefully discriminatory", *Harrison* v. *Brooks,* supra, 446 F.2d at 407, "knowing or reckless", id., or "willfull, *Ka-Harr, Inc.* v. *Huck,* 345 F. Supp. 54 (E.D. Wis. 1972). Also in *Gaffney* v. *Silk,* 488 F.2d 1248 (1 Cir. 1973) the court stated as follows:

> ". . . It is a clear rule in this circuit that liability will attach only where defendants subjectively realized (that their action) would result in depriving the plaintiff of a right or privilege secured by the constitution of the United States". (*Cobb* v. *City of Malden,* supra, 202 F.2d at 707 (1953)).

To succeed on a claim for damages under § 1983, a plaintiff must show that defendants' action violated his constitutional rights and caused him compensable injury. *Carey* v. *Piphus,* 435 U.S. (1978); *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Petitioner had alleged nothing from which the District Court could infer that he had suffered any form of compensable injury from the acts described in the complaint.

At the Court of Appeals, the appellee, (here respondent) contended that the requirements of *Gaffney* v. *Silk,* 488 F.2d 1248, (1 Cir. 1973), mandated the dismissal of the complaint, not merely because a qualified immunity *had actually been invoked* by defendant Astol Calero, within whose context, the insufficiency of the allegations of the complaint could be determined, but also because the element of good faith in Astol Caleros' actions, though not questioned in the com-

plaint, had definitely been before the District Court, since in the answer to the complaint the defendant stated, as an affirmative defense, that "at all times pertinent to the complaint, the Superintendent of Police had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico", and since, as stated in the Decision and Order, the Complaint, even when read in the light most favorable to plaintiff, completely failed not only to "prove with particularity", but even to allege that this defendant had acted in bad faith or that his conduct had been purposefully discriminatory and reckless.

Petitioner has alleged that a clear violation of statutory due process, coupled with some allegations in the original complaint, was sufficient to negate defendant's qualified immunity, but the truth is that there never was such a violation of due process (allegedly consisting in the absence of a hearing prior to his discharge), since Act 26 of August 22, 1974 does not actually grant the celebration of such a hearing and neither do the Puerto Rico Police Regulations of 1968, while it could hardly be feasible to describe the Superintendents' official actions justly as "discriminatory persecution and wrong doing" since he limited himself to the most uniform enforcement of all Laws and Regulations applicable. So there could be no evidence of bad faith per se in such a normal discharge of respondent's official duties.

Finally, the fact that, upon appeal, the C.I.P.A. revoked the Superintendent of Police, serves as proof that the plaintiff was afforded, to a full extent, the benefits of a due process that unquestionably favored him.



An exemplary decision as such could only be construed, at most, to imply that the Superintendent had incurred in an administrative error, for which the plaintiff has been already adequately compensated by being reinstated to his former position, with salaries accrued. Therefore, absent the necessary original allegations to establish bad faith and to contradict later its affirmation, the complaint was indeed insufficient to assert and sustain a civil rights claim for damages against the respondent.

## II. Petitioner Has Unsuccessfully Alleged Violation Of His Constitutional Rights Under The First Amendment And Did Not Allege Any Violation Of Any Rights Under The First Amendment.

### A. The discharge of petitioner without a prior formal administrative hearing was not a deprivation of property or liberty or a violation of due process of law.

As to the statutory due process supposedly vitiated by Respondent Calero's "act", paragraph 17 of the Complaint read as follows:

> "17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974 which law requires the celebration of administrative hearing prior to imposing disciplinary measure against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's right not to be arbitrarily discharged from public employment."

The respondent submitted that this particular allegation was not sustained anywhere or in anyway by

law. The contents of Act 26, 1974 (supra) do not grant the celebration of an administrative hearing prior to the imposition of disciplinary measures against members of the Police Force. Act 26 (supra), at its pertinent part, provides for the method to be followed in the imposition of disciplinary measures, and divides it in two: one for light shortcomings and one for serious shortcomings. (Please refer to Section 12, 13 and 14 of Act 26, supra). In no part of these sections of Act 26, supra, aforecited can it be found the administrative hearing that plaintiff affirms to exist, or his entitlement to it. There is only one reference to an opportunity for a defendant in those proceedings "to be heard", (not a formal administrative hearing) and that is in Section 14, part (b) which reads as follows: "The Superintendent, after examining *and analyzing the record, and after giving the defendant an opportunity to be heard,* shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section." (Emphasis supplied.)

We respectfully believe that, in no way, the aforementioned section could be misconstrued to imply that Law 26 (supra) requires "the celebration of an administrative hearing prior to imposing disciplinary measures against members of the force", and petitioner has not even alleged that he was denied the above cited opportunity.

Besides all the contentions stated above, we respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, repealing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former posi-



tion with salaries accrued." (Please refer to Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation).

In view of the fact that petitioner was reinstated to his former position, with back pay, by the Investigation, Prosecution and Appeals Commission of the Police Department, we respectfully submit that petitioner was not and is not further entitled to any other remedy from the courts since he obtained all the remedies he claimed for in the administrative hearing at the Investigation, Prosecution and Appeals Commission, and he has been fully indemnified for the damages he suffered as a consequence of the alleged act performed by respondent the Superintendent of Police, upon petitioner's receipt of all the salaries accrued while he was discharged So, it can not be said, at all, that he has been deprived either of his liberty or his property.

**B. Petitioner's complaint did not state a specific claim for relief under the First Amendment since he did not allege that he was discharged in retaliation for an exercise of protected speech.**

In paragraph 17 of his complaint, petitioner alleged that his discharge further violated his right not to be arbitrarily discharged form public employment, but he did not plead that his discharge had constituted a retaliation for any previous exercise of a First Amendment right, as protected speech, on his part.

The uncontested fact remains that petitioner was not discharged from his post in the Police Department because he exercised his freedom of speech. On the contrary, he was discharged specifically for violating Rules 3 and 26, Chapter 7, Sec. 1 of the Regulations of the

Police of Puerto Rico, by unwarrantedly denigrating the dignity of two fellow members of the corps and observing an injurious conduct, thus harming the Police Department (presumably where it could hurt most: internally in its Esprit de Corps, its morale and, externally, on its reputation, its public image and the trust and confidence that the whole community had in its law and order branches of its government.)

There is no evidence on the record to suggest that the petitioner was discharged for the *substantive* content of any of his previous charges and criticisms. On the contrary, the explicit reasons given for it, reveal that he was discharged for his unjurious conduct and for the damaging way in which, not acting within his official duties, he chose to engage in objectionable acts (like tapping private telephone conversations with fellow police officers) which escalated into the deplorable succession of events that originated the instant case.

The fact that petitioner was promptly reinstated in his former position, with salaries accrued, constitutes sufficient indication of the respect that his constitutional rights commanded with the respondent, who acted likewise solely upon a ruling of the Investigation, Prosecution and Appeals Commission of the Police itself.

## CONCLUSION

Although this Honorable Court has not spoken directly to the issue. We deem that the logic to justify placing on a plaintiff the burden of pleading bad faith on part of a defendant rest upon the fact that, in the absence of such bad faith, the defendants' actions would not have rendered him liable for damages. As such, without the concurrence of that very bad faith, the plaintiff would even lack a valid cause of action. No



wonder the First Circuit has considered the allegation of bad faith a basic pleading in cases as the instant one.

This is not to be construed as implying that after being accused of acting in bad faith, a defendant may not bear the burden of pleading that the contrary was true, and explain to the Court why, when and how he came to believe that he was doing right when in fact he did wrong.

Pleading bad faith on the part of the defendant may be the plaintiff's burden, while pleading good faith on his part and belaying plaintiff's contentions may remain the defendants' burden, but this, only after he has been charged first.

The fact remains that no one should be required to put forward a defense against imaginary imputations which have not even been formulated, or to state his position concerning possible or probable issues which have not been raised yet in a case against him.

For all the above stated reasons, respondent respectfully requests that the decision of the First Circuit Court of Appeals affirming the decision of the United States District Court for the District of Puerto Rico dismissing the instant case be affirmed.

Respectfully submitted,

HECTOR A. COLON CRUZ

*Solicitor General for the Commonwealth of Puerto Rico*

FEDERICO CEDO ALZAMORA

*Assistant Solicitor General*

At San Juan, Puerto Rico, March 25, 1980.

## PROOF OF SERVICE

I hereby certify that on this same date a copy of the foregoing Brief for Respondent has been served to Michael Avery, attorney for petitioner, at Two Park Square, Boston, Massachusetts, 02116; David Rudovsky, attorney for petitioner, at 1425 Walnut Street, Philadelphia, Pennsylvania, 19102; and José L. Rodriguez Mangual, attorney for petitioner, at Condominio Le Mans, Avenue Muñoz Rivera 602, Hato Rey, Puerto Rico, 00918; Leon Friedman, Attorney for Amicus Curiae, Hofstra University, School of Law, Hempstead, N.Y. 11550; and Charles S. Sims & Bruce J. Ennis, Attorneys for Amicus Curiae, American Civil Liberties Union Foundation, 22 East 40th Street, New York, N.Y., 10016.

At San Juan, Puerto Rico, March 25, 1980.

FEDERICO CEDO ALZAMORA

*Assistant Solicitor General*
*Department of Justice*

P.O. Box 192
San Juan
Puerto Rico 00902
Phone: (809) 724-1913